



International Chamber of Commerce

The world business organization

Policy statement

ICC Comments on EU-US Positive Comity Agreement

Law and Practices relating to Competition, 12 March 1997

The ICC appreciates the opportunity to comment on the draft agreement between the European Communities and the Government of the United States of America on the application of positive comity principles in the enforcement of competition laws.

The ICC supports the initiative to develop cooperation between the two parties through positive comity. Positive comity will provide governments with a preferable alternative to the extraterritorial exercise of their jurisdiction when they wish to deal with anti-competitive activities in other countries which adversely affect their consumers.

However, there are certain issues raised by this new agreement on which the ICC would like to comment:

1. The new agreement is said to be "intended to supplement and to be interpreted consistently with the 1991 Agreement" (Article VI). As both agreements will run side by side, will the new positive comity agreement automatically take precedence over the 1991 agreement in the event of inconsistency or differences in scope? The ICC would welcome clarification as to how the two agreements will be applied and how they are intended to function together as provisions in the two agreements are not always consistent (for example the definition of "competition laws" covered by the 1991 agreement includes mergers while these are expressly excluded in the new agreement).

2. The limitations in this agreement may prevent it from being effective in discouraging the extraterritorial exercise of jurisdiction by competition authorities. For example, cases where activities taking place in one country are not contrary to its competition laws but have an adverse effect on the other country's interests (e.g. pure export cartels) are not addressed in this agreement.

Another factor which dilutes the effect of the agreement is the weakness of provisions governing the deferral or suspension of the requesting authorities' own enforcement activities. The requesting authority may in fact choose not to defer or suspend its enforcement activities even if the conditions in Article IV are satisfied (Article IV 3) and may initiate or reinstitute independent enforcement proceedings later at any time (Article IV 4). The presumption of deferral or suspension may also be overridden where the affected party wishes to impose its own penalties (Article IV 2 (b)). There is thus no real pressure for a party to use the positive comity procedure instead of, rather than in addition to, exercising its jurisdiction extraterritorially.

The ICC recommends that language be modified or added to avoid these dilutive effects. In order for the positive comity agreement to be meaningful, its terms should provide for effective implementation of the positive comity procedures.

3. While the ICC is pleased to note that the exchange of information between the parties will be limited to the framework provided in the agreement between the European Communities and the United States of 1991 and the exchange of letters in 1995, it wishes to raise certain concerns.

Firstly, it feels strongly that any business information exchanged should only be used by the receiving authority for purposes for which it was disclosed. It therefore urges that the provision in Article V

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allowing competition authorities receiving information to use it for purposes other than to implement the agreement be deleted

Article IV 2(c)(iii) provides that confidential information will only be exchanged, used for enforcement activities, and disclosed outside the limits of the 1991 agreement with the consent of "the source concerned". The ICC stresses the importance of making it clear that the "source concerned" should always include the company from which the document emanates, even if this was provided to the authorities by a third party.

Sentence two of the same provision excludes use of relevant confidential information for "enforcement" activities by the requesting party. It should also exclude use of such information for "investigation" activities.

The ICC reiterates the great importance that the business community places on the protection of its confidential information and refers to its statement of March 1996 on this issue.

4. The ICC advocates that the positive comity procedure be conducted with as much transparency as possible vis--vis the companies being investigated.

In the course of an investigation initiated within the framework of the present draft agreement, the ICC suggests that the investigating authority should inform the companies being investigated of the following, unless doing so would be prejudicial to the investigation:

- the fact that the investigation has been initiated at the request of the other competition authority;
- whether both authorities intend to pursue their investigations or whether the requesting authority will defer or suspend its own investigative activities;
- the exact nature of any confidential information being exchanged. Exchange of information should of course be subject to the safeguards referred to above and in the ICC paper of March 1996.

5. With respect to the scope of the agreement, the phrase "appear to be [impermissible]" in Art. I.1(b) should be reviewed. This formulation is unnecessary as there is already the qualification "where there is reason to believe" in the introductory phrase. There also appears to be a discrepancy with the German version which we understand states that the activities in question should be "obviously impermissible".

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